RAVINDRAN A/L KUNJI KUTTAN

v.

TENAGA NASIONAL BERHAD

HIGH COURT MALAYA, KUALA TERENGGANU
DATUK MOHD. SAARI YUSOFF J
[CIVIL SUIT NO. 25-7-87]
22 MAY 1996

TORT: *Occupier's liability - Accident at worksite - Owner of premises contracted construction work to third party - Whether owner vicariously liable - Whether owner an occupier - Whether liable for negligence - Duty of occupier - Res ipsa loquitur.*

TORT: *Personal injuries - Claim for special and general damages - Fracture of shaft of right femur - Pain and suffering and loss of amenities - Pre-trial and future loss of earnings - Whether loss for future earnings ought to be real - Years of purchase - Proper quantum - Failure to prove special damages - Whether fatal.*

WORDS & PHRASES: *"Premises" - "Occupier".*

The plaintiff had suffered injuries after falling off a ladder while working at a hydroelectric project worksite owned by the defendant. In consequence the plaintiff filed a suit against the defendant, alleging negligence and claiming for special and general damages.

It was not in dispute that the defendant had contracted out the construction of the project to one Hyundai Construction Co. Ltd. (Hyundai), that one Snowy Mountain Engineering Corporation (Snowy Mountain) was the consultant appointed to supervise the project, and that the plaintiff, a surveyor by profession, was an employee of Snowy Mountain. The facts showed that on the day in question, the plaintiff was assigned to check the measurement of the intake structure of a certain block C level 148. However, as the plaintiff was half way up the ladder to go to the level, a piece of plywood used for the construction of formwork struck the plaintiff, thereby causing him to fall off. The said formwork was built by Hyundai, and apparently, no workers of the defendant were involved in its construction.

It was common ground that the defendant was not directly involved in the construction of the project. Nonetheless, the defendant was responsible for issuing security passes for the workers, and had also had a project manager at the worksite to check the work done by Hyundai. Before the learned Judge the plaintiff invoked *res ipsa loquitur* and the primary questions that arose were:

(1) Whether the defendant, as owner of the project, was vicariously liable. *a*

(2) Whether the defendant was in law an occupier, and if so, was liable for negligence.

Held:

b

[1] As none of the defendant's workers was involved in the construction of the formwork, the defendant could not be held vicariously liable for the mishap that befell the plaintiff.

[2] In common law, the term "premises" applies not only to real property but also to objects such as grandstands, stagings, diving boards, ships in dry docks, ladders and electricity pylons. *c*

[3] To be an "occupier" it is not necessary that a person should have entire control over the premises. Suffice if he has some degree of control. Thus, when an owner employs an independent contractor to do work on the premises, such owner is still regarded as sufficiently in control of the place as to be under a duty towards persons coming lawfully to the premises. In law, there is nothing wrong in having more than one occupier in respect of one site or premises. *d*

[4] In this case, while it is true that Hyundai was the contractor for the project, it did not have exclusive possession of the intake structure. As it was, the defendant had its own project manager and a co-ordinating engineer at the worksite, and was also responsible for issuing security passes to the workers. More importantly, clause 37 of the agreement between the defendant and Hyundai expressly gave the defendant access to the worksite. The defendant thus had joint control of the intake structure with Hyundai, and hence, was an occupier of the place where the accident occured. *e* *f*

[5] By the act of the plywood falling off from the level above the ladder, it implies that the plywood was not properly secured. The construction of scaffolds could have prevented such falling but no scaffolds had been constructed. *Res ipsa loquitur* therefore applies as the plywood used in the construction of formwork must have been unsafe. *g*

[6] It was reasonably forseeable that the plywood would fall off and hit the plaintiff using the ladder if plywood used in the construction of formwork, as was evident here, was not properly secured. The defendant, being an occupier, was negligent in failing to ensure that the plywood was safe and properly secured. *h*

[7] The plaintiff has not proved his claim for special damages under six of the eight items thereunder, and consequently, under this heading, only the agreed two items amounting to RM2570.30 is awarded. On pre-trial loss *i*

of earnings, on the facts, RM21,630 is awarded. As for loss of future earnings, and pain and suffering and loss of amenities, bearing in mind the authorities and the facts, the plaintiff is entitled to an award of RM32,729.25 and RM18,000 respectively.

[Judgment for plaintiff. Order accordingly]

Cases referred to:

Wheeler v. Copas [1981] 3 All ER 405 ***(foll)***

Wheat v. E. Lacon & Co. Ltd. [1966] AC 552 ***(foll)***

Law Tin Sye v. Yusuf bin Muhammad [1973] 2 MLJ 186 ***(foll)***

Lembaga Kemajuan Tanah Persekutuan v. Mariam & Ors. [1984] 1 MLJ 283 ***(foll)***

Tay Tong Chew & Anor. v. Abdul Rahman b. Hj. Ahmad [1985] 1 MLJ 50 ***(refd)***

Ting Jie Hoo v. Lian Soon Hing Shipping Co. [1990] 1 CLJ 167; [1990] 2 MLJ 56 ***(foll)***

Yeap Cheng Hock v. Kajima-Taiser Joint Venture [1973] 1 MLJ 230 ***(foll)***

Balakrishnan s/o Kinjamboo Nair v. Sevastine Anthony s/o Frances [1991] 1 CLJ 503 ***(refd)***

Tan Sia Bak v. Mooi Kim Ming & Anor. [1989] Mallal's Digest 219 ***(refd)***

For the plaintiff - Ponmugam (Azman with him); M/s. Ponmugam & Co.
For the defendant - Suzana binti Ali; M/s. Haranay Roni Anikah.

JUDGMENT

Mohd. Saari Yusoff J:

By profession plaintiff was a surveyor grade 2 appointed by Snowy Mountain Engineering Corporation to work at Hydroelectric Project Kenyir Terengganu (hereinafter referred to as the project) as evidenced by service agreement (exhibit P4) dated 16 August 1982.

At the trial, learned defence Counsel informed the Court that the defendant accepted the rights and liabilities of Lembaga Letrik Negara. For purpose of brevity and convenience, in this judgment, I refer to Lembaga Letrik Negara as the defendant.

It is common ground that the defendant was the owner of project. Hyundai Construction Co. Ltd. (hereinafter referred to as Hyundai) was appointed by the defendant as contractor for the project. Snowy Mountain Engineering Corporation was appointed by the defendant to act as a consultant who was responsible for the supervision of the project.

The uncontroverted fact is that on 8 February 1984, plaintiff was assigned to check the measurement of intake structure block C level 148 to ascertain whether the contractor had complied with the specifications as stated in the contract between the defendant and Hyundai.

As the plaintiff was half way up the ladder to go to level 148, a piece of plywood 4' x 8' x 3/4" (material used in contructing formwork) struck the plaintiff causing him to fall off the ladder. He sustained injuries.

From the evidence of SD1, during peak period, there could be as many as 600 persons at work site. This number included persons engaged in the construction of intake structure block C.

Issues which arise:

(i) whether defendant was vicariously liable (pleaded in paragraph 6 of statement of claim);

(ii) whether defendant was an occupier (pleaded in alternative paragraph 7 of statement of claim).

On the first issue, based on the evidence of SD1, Hyundai was appointed as the contractor in constructing the dam. During peak period, there were about 600 persons working on the project, including those working at the intake structure block C. The inference to be drawn from evidence was that Hyundai constucted the formwork at level 148. Under cross-examination, the plaintiff (SP3) admitted that Hyundai built the formwork. On the date and time of the accident, he did not see any person working on level 148 which was then the highest level completed. On the evidence, it would appear that none of the defendant's workers was directly involved in the construction of formwork. That being so, I hold that the defendant was not vicariously liable.

On the second issue, reference is made to the contract document entered into between the defendant and Hyundai. In the agreement (Exhibit D8), clause 37 states:

> 37. The employer, the engineer and any person authorised by them shall at all times have access to the works and to the site and to all workshops and laboratories and places where work is being prepared or where materials manufactured articles or machinery are being obtained for the works and the contractor shall afford every facility for and every assistance in or in obtaining the right to such access.

Under clause 1 of the agreement, the term "employer" is defined as follows:

> (a) 'Employer' means Lembaga Letrik Negara Tanah Melayu or in English National Electricity Board Of The States Of Malaya and includes the Employer's agents, servants or successors.

SD1 was the project manager employed by the defendant. In his evidence he stated that his duty was to check the work done for purpose of progress payment.

Next, I turn to the law. Under common law, the term "premises" has been held to apply not only to real property but also objects such as grandstands, stagings, diving boards, ships in dry docks, ladders and electricity pylons". (*Wheeler v. Copas* [1981] 3 All ER 405; *Law Tin Sye v. Yusuf bin Muhammad* [1973] 2 MLJ 186).

On definition of occupier, in *Wheat v. E. Lacon & Co. Ltd.* [1966 AC 552] at page 578, Lord Denning states *inter alia:*

> In order to be an 'occupier' it is not necessary for a person to have entire control over the premises. He need not have exclusive occupation. Suffice it that he has some degree of control. He may share the control with others. Two or more may be 'occupier' and whenever this happens, each is under a duty to use care towards persons coming lawfully on to the premises, dependent on his degree of control. If each fails in his duty, each is liable to the visitor who is injured in consequence of his failure, but each may have a claim to contribution from the other.

Further, His Lordship states:

> Fourthly, where an owner employed an independent contractor to do work on premises or a structure the owner was usually still regarded as sufficiently in control of the place as to be under a duty towards all those who might lawfully come there ...

In *Lembaga Kemajuan Tanah Persekutuan v. Mariam & Ors.* [1984] 1 MLJ 283, the appellants, a statutory authority (Felda), had entered into an agreement with a contractor to weed and maintain a land scheme in Pahang. Unknown to the appellants, the work was sub-contracted and amongst the workers employed by the sub-contractor was the deceased. He and his fellow workers lived in a kongsi house built on the scheme either by the contractor or the sub-contractor. The kongsi house collapsed and the deceased was killed in the mishap. The dependents of the deceased sued the contractor, sub-contractor and the appellants. Judgment in default of appearance was entered against the contractor and sub-contractor and the case proceeded against the appellants.

In that case, Salleh Abas CJ (Malaya) (as he then was) had this to say:

> The appellants did not cease to be in possession of the site. After all an occupier is a person who has control over the relevant premises or site. If an owner demised his premises he certainly parted with possession of it but here the possession given was said to be not as to amount to a tenancy. This fact coupled with the general control and supervision which Felda had, clearly indicated that Felda was also an occupier of the scheme. There is nothing wrong in having more than one occupier in respect of one site or premises.

Revert to the instant case. It is true that Hyundai was the contractor for the project. The question is whether Hyundai had exclusive possession of the intake structure. SD1 was the project manager employed by the defendant. His duty

was to check the work done for the purpose of progress payment. Then, there was a co-ordinating engineer employed by the defendant, one Tee Boy who had access to the work site. Further, the defendant was responsible in issuing security pass which enables a worker to enter the work site. More importantly, there is clause 37 in the agreement (exhibit D8) between the defendant and Hyundai giving the defendant access to the work site. In the circumstances, it is my finding that Hyundai did not have exclusive possession of the intake structure and that the defendant had joint control of the intake structure with Hyundai.

In applying the foregoing principles to the facts of the instant case, I hold that the defendant was an occupier of the intake structure block C where the accident occured.

Whether res ipsa loquitur applies

The plywood which fell on the plaintiff (SP3) was used in constructing formwork at the intake structure. By the act of the plywood falling off from level above the ladder, it implied that the plywood used in the construction of formwork was not properly secured.

In SP3's evidence, he stated that with construction of scaffold around the ladder where the accident occured, it could prevent a falling object from hitting a person using the ladder. Scaffold was constructed after the accident.

In this case, I take the view that *res ipsa loquitur* applies in that the plywood used in the construction of formwork must have been unsafe as it was not properly secured. It was reasonably forseeable that the plywood would fall off and hit the plaintiff (SP3) using the ladder if plywood used in construction of formwork, as here, was not properly secured. Then there was no scaffold around the ladder. By the defendant falling to ensure that the plywood was properly secured, I hold that being the occupier, the defendant was negligent.

As for quantum, item 7 (RM1820.65) and item 8 (RM749.65) had been agreed. I award the amount as agreed. As regard claim for special damages under item 1, 2, 3, 4, 5, 6, the claim had not been proved. Hence, claim under this head was disallowed.

On pre-trial loss of earning, the plaintiff (SP3) worked a total of 42 months. No documentary evidence in the form of income tax return or employer's records were produced to substantiate the amount of earnings received. The learned defence Counsel suggested the amount of average earnings as RM500 p.m., which amount I regard as reasonable. At the time of the accident, the plaintiff's earning was RM1,015. Under this head, I award RM21,630 (RM515 x 42 months).

Plaintiff was a surveyor which involved standing and walking over long period. According to SP1 (specialist), due to the injury, plaintiff was unable to climb ladders and scaffoldings. In his opinion, plaintiff was unable to work as a surveyor.

On loss of future earnings, in law, in order to succeed under this head of claim, the loss must be real and not speculative (*Tay Tong Chew & Anor. v. Abdul Rahman b. Hj. Ahmad* [1985] 1 MLJ 50). In his evidence, the plaintiff said that he received RM500 p.m. as a cashier in a family restaurant. In family business, it was normal to provide a family member with free board and lodging, which I value to be about RM100 p.m. making plaintiff's total earning to be about RM600 p.m. Based on plaintiff's earning of RM1,015 p.m. as on the date of accident, plaintiff's loss of earning would be RM415 p.m. (see *Abdul Hamid v. Ooi Teik Ean & Anor.* [1979] 1 MLJ 244).

The plaintiff was 37 years old in 1985 and taking 55 as the retirement age and allowing 1/3 from this for contigencies of life, the years of purchase would be fixed at 12 (see *Ting Jie Hoo v. Lian Soon Hing Shipping Co.* [1990] 2 MLJ 56). Based on annuity table and less 25% for income tax, under this head, I award a sum of RM32,729.25 (see *Yeap Cheng Hock v. Kajima-Taiser Joint Venture* [1973] 1 MLJ 230).

Based on medical report (P3) by medical officer and the evidence of specialist (SP1), plaintiff had fracture of shaft of right femur. There was 1cm shortening. He was treated with open reduction and nailing and was discharged from General Hospital Kuala Terengganu on 25 February 1984. In 1986, due to osteomyelitis (infection of bone), plaintiff had surgery and was treated with antibiotic at Penang Medical Centre.

Under this head of claim (for pain and suffering and for loss of amenities), En. Ponmugam (Counsel for the plaintiff) cited *Lee Eng Beng's* case [1987] 1 MLJ 121. In that case, the Court awarded RM31,500 for fracture of femur and multiple abrasions and lacerations.

For fracture of right femur, I was guided by the case of *Balakrishnan s/o Kinjamboo Nair v. Sevastine Anthony s/o Frances* [1991] 1 CLJ 503 (where the award was RM20,000 for fracture of shaft of the right femur with 4cm shortening). In *Tan Sia Bak v. Mooi Kim Ming & Anor.* [1989] *Mallal's Digest* 219 the award for general damages was RM20,000 for fracture of femur, right *tibia*, left first metatarsal, right fifth metacarpal and right *tibial plateau.* There was 1cm shortening. In instant case, for pain and suffering and loss of amenities, I award RM18,000.

As for special damages, there shall be paid interest at the rate of 4% p.a. from the date of accident to date of judgment and 8 % from the date of judgment to realisation. No interest for loss of future earnings.

As for general damages, interest from the date of service of writ to realisation. Cost to plaintiff.

Reported by W.A. Sharif